Bunga Raya Auto Credit Sdn Bhd v Atlas Housing Sdn Bhd & Ors

HIGH COURT (MUAR) — CIVIL SUIT NO 23–16 OF 2007
AHMADI ASNAWI JC
10 MARCH 2008

Civil Procedure — Interim payment — Pending outcome of civil suit — Principles applicable — Rules of the High Court 1980 O 22A

The plaintiff was the registered owner of a piece of land and the first defendant was the owner of a land that is adjacent to the land belonging to the plaintiff. On December 2006, the second defendant, a property developer, commenced excavation works near the base of and under the retaining wall separating the plaintiff's and the first defendant's land. The said retaining wall sat on the plaintiff's land. The excavation works had resulted in the removal of gravel and earth from the retaining wall without leaving a proper vertical or lateral support for the said retaining wall. Due to the second defendant's negligence, the plaintiff contended that the said retaining wall had undergone some settlement and moved excessively and had resulted in cracks and was likely to collapse. Additionally, an internal road next to the retaining wall too had settled and cracks had appeared on the said road. Both the water pipes and hydrant pipes on the said land along the settled road had also broken. The plaintiff had demanded the second defendant to cease all works near the retaining wall and to prevent further movement of the said retaining wall. Nevertheless this was ignored by the second defendant. In consequence, the plaintiff instituted this action against the defendants to remedy his losses. Pending the full trial of this action, the plaintiff filed an application for an interim payment in the sum of RM832,000 in respect of the said damages pursuant to O 22A of the Rules of the High Court 1980 ('the RHC'). The plaintiff through their consultants has procured two quotations in respect of the costing for the rectification works to make good the said damages amounting to RM724,320 and the other, costing of RM701,700. There were further reports by the plaintiff's consultant dated 20 August 2007 to the effect that the damages caused by the ground movement had deteriorated and worsen since their last inspection, caused by seepage of water into the crack areas, causing further settlement.

Held:

(1) In order to succeed against the second defendant under O 22A, the burden was on the plaintiff to prove on the balance of probabilities that it was appropriate for the court to order an interim payment to alleviate the plaintiff's hardship, a standard set out in the case of *Mediahouse Sdn Bhd v Koh Kom Suan* [1998] 1 LNS 415) (see para 4).

(2) The plaintiff had proven their case on a balance of probabilities. The plaintiff's claim was well supported by photographs, documentary and affidavit evidence that the second defendant had breached their legal duty of care towards the plaintiff. Being immediate neighbours, the second defendant obviously owed the plaintiff a duty of care to ensure that the plaintiff's land/properties were protected from being damaged. The second defendant certainly failed to observe the duty of care, resulting in damages occurring on the plaintiff's land/properties. The damages on the plaintiff's land was of course something which was very foreseeable (see para 8).

(3) Equally the second defendant did not and had failed to take any reasonable steps to prevent the said damages from occurring. The plaintiff did indeed suffer substantial damages on their land/properties as a result of the second defendant's activities on the land belonging to the first defendant (see para 8).

(4) In the circumstances, the plaintiff had satisfied the required standard of proof in establishing that it would succeed in its case should it proceed to trial. Therefore, pursuant to O 22 r 9 of the RHC the court allowed the interim payment sought only for thr sum of RM700,000 (*Sarlim Timber Processing Factory Sdn Bhd v Sasacom Sdn Bhd* [2006] 1 LNS 166) (see para 9).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar sebidang tanah dan defendan pertama adalah pemilik tanah bersebelahan dengan tanah plaintif. Pada Disember 2006, defendan kedua, seorang pemaju tanah, memulakan kerja penggalian berhampiran dengan tapak dan di bawah tembok penahanan yang memisahkan tanah plaintif dan defendan pertama. Tembok penahanan berada di atas tanah plaintif. Kerja penggalian telah menyebabkan kerikil dan tanah dikeluarkan daripada tembok penahanan tanpa meninggalkan satu sokongan yang tegak atau secara lateral yang sesuai untuk tembok penahanan tersebut. Disebabkan kecuaian defendan kedua, plaintif menegaskan bahawa tembok penahanan tersebut telah mengalami mendapan dan pergerakan yang lampau yang menyebabkan retakan dan kemungkinan akan runtuh. Tambahan, satu jalan dalaman bersebelahan tembok penahanan juga telah

mengalami pemendapan dan retakan-retakan telah muncul di jalan tersebut. Kedua-dua paip air dan hydran di atas tanah tersebut sepanjang jalan yang mendap tersebut juga telah rosak. Plaintif telah mengarahkan defendan kedua supaya memberhentikan segala kerja-kerja berhampiran tembok penahanan untuk mengelakkan lebih banyak gerakan kepada tembok penahanan tersebut. Tetapi ini tidak diendahkan oleh defendan kedua. Dengan itu, plaintif memulakan tindakan ini terhadap defendan-defendan untuk meremedikan kehilangannya. Sementara menunggu perbicaraan penuh tindakan ini, plaintif telah memfailkan satu permohonan untuk bayaran interim untuk jumlah RM832,000 berhubungan dengan kerugian tersebut mengikut A 22A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif melalui perunding-perundingnya telah mendapatkan dua sebut harga berhubungan dengan kos kerja-kerja pembaikan kerosakan tersebut yang berjumlah RM724,320 dan yang satu lagi berjumlah RM701,700. Terdapat juga laporan-laporan lanjut oleh perunding-perunding plaintif bertarikh 20 Ogos 2007 yang menyatakan bahawa kerosakan-kerosakan yang disebabkan oleh pergerakan tanah telah bertambah buruk dan teruk semenjak pemeriksaan mereka yang terakhir, yang disebabkan oleh peresapan air ke arah retakan-retakan, yang menyebabkan pemendapan yang lebih buruk.

Diputuskan:

(1) Untuk berjaya terhadap defendan kedua di bawah A 22A, beban adalah atas plaintif untuk membuktikan atas imbangan kebarangkalian bahawa ia adalah sesuai untuk mahkamah memerintahkan satu bayaran interim untuk mengurangkan kesusahan plaintif, satu ukuran yang dinyatakan di dalam kes *Mediahouse Sdn Bhd v Koh Kom Suan* [1998] 1 LNS 415) (lihat perenggan 4).

(2) Plaintif telah membuktikan kesnya atas imbangan kebarangkalian. Tuntutan plaintif disokong dengan gambar-gambar, keterangan dokumentari dan afidavit bahawa defendan kedua telah melanggar kewajipan berjaga-jaga terhadap plaintif. Sebagai jiran yang terdekat, defendan kedua jelas mempunyai kewajipan berjaga-jaga untuk memastikan tanah/harta benda plaintif dilindungi daripada dirosakkan. Defendan kedua juga telah gagal untuk mematuhi kewajipan berjaga-jaga tersebut yang menyebabkan kerosakan pada tanah/harta benda plaintif. Kerosakan pada tanah plaintif adalah sesuatu yang boleh diramal (lihat perenggan 8).

(3) Begitu juga defendan kedua tidak mengambil atau gagal mengambil sebarang langkah-langkah yang munasabah untuk menghalang kerosakan-kerosakan tersebut daripada berlaku. Plaintif sememangnya telah mengalami kerosakan-kerosakan yang teruk pada tanah/harta

bendanya disebabkan oleh aktiviti-aktiviti defendan kedua di atas tanah kepunyaan defendan pertama (lihat perenggan 8).

(4) Dalam keadaan ini, plaintif telah memuaskan standard pembuktian yang diperlukan dalam membuktikan bahawa ia akan berjaya di dalam kesnya jika ia terus kepada perbicaraan. Oleh itu, menurut A 22 k 9 KMT mahkamah membenarkan bayaran interim yang dituntut hanya untuk jumlah RM700,000 (*Sarlim Timber Processing Factory Sdn Bhd v Sasacom Sdn Bhd* [2006] 1 LNS 166) (lihat perenggan 9).]

Notes

For a case on interim payments in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3653.

Cases referred to

David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor [2005] 2 MLJ 260 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Mediahouse Sdn Bhd v Koh Kim Suan [1998] MLJU 300 (refd)
Sarlim Timber Processing Factory Sdn Bhd v Sasacom Sdn Bhd [2006] MLJU 394 (refd)

Legislation referred to

Rules of the High Court 1980 O 22 r 9, O 22A, O 22A r 2, O 22A r 3(1)(a), O 22A r 3(1)(b)

Yoong How Vey (Ho & Co) for the plaintiff.
Mong Chung Heng (Shearn Delamore & Co) for the defendant.

Ahmadi Asnawi JC:

[1] This is the plaintiff's application by way of Notis Permohonan Bagi Pembayaran Interim (Kandungan 20) pursuant to O 22A r 2 of the Rules of the High Court 1980, for an order that the second defendant do make an interim payment in the sum of RM832,200 to the plaintiff pending the disposal of the main suit.

[2] The plaintiff is the registered owner of a piece of land held under Lot PTD 24925, Mukim Simpang Kanan, Daerah Batu Pahat, Johor. Whereas the first defendant is the owner of a piece of land held under Lot PTD 325, Mukim Simpang Kanan, Batu Pahat, Johor, a land that is adjacent to the land belonging to the plaintiff. On December 2006, the second defendant, a property developer, commenced excavation works near the base of and under the retaining wall separating the plaintiff's and the first defendant's land. The said retaining wall sits on the plaintiff's land. The excavation works had

A resulted in the removal of gravel and earth from the retaining wall without leaving a proper vertical or lateral support for the said retaining wall. Due to the second defendant's negligence, the plaintiff contended that the said retaining wall had undergone some settlement and moved excessively and had resulted in cracks and is likely to collapse. Additionally, an internal road next B to the retaining wall too had settled and cracks had appeared on the said road. Both the water pipes and hydrant pipes on the said land along the settled road had also broken. The plaintiff had demanded the second defendant to cease all works near the retaining wall and to prevent further movement of the said retaining wall. Nevertheless this was ignored by the second defendant. In C consequence, the plaintiff instituted this action against the defendants to remedy his losses.

[3] Pending the full trial of this action, the plaintiff filed an application for an interim payment in the sum of RM832,000 in respect of the said damages D pursuant to O 22A of the Rules of High Court 1980 ('the RHC'). The law in respect of interim payment was explained by the Court of Appeal in *David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor* [2005] 2 MLJ 260. In that case Nik Hashim JCA (as he then was) said:

E

> Thus, under this rule the court may, on an application by the plaintiff, order interim payment be made pending the outcome of the civil suit.
>
> In the present appeal for the appellant to succeed, the appellant has to satisfy the court the requirements laid down under O 22A r 3(1) of the RHC which states:

F

> (a) that the defendants (respondents) have admitted liability for the appellant's damages; or
>
> (b) that the appellant has obtained judgment against the respondents for damages to be assessed; or

G

> (c) that, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents.
>
> Order 22A r 3(1) of the RHC also provides that should the appellant be able to satisfy the court of any one of the requirements mentioned above, the court, H may, if it thinks fit order the respondents to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the appellant after taking into account of any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondents may be entitled to rely.

I

[4] The case also explained the underlying purpose of O 22A. It is to provide for an interim payment to alleviate the plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial. Henceforth, in order to succeed against the second

defendant under O 22A, the burden is on the plaintiff to prove on the balance of probabilities that it is appropriate for the court to order an interim payment to alleviate the plaintiff's hardship, a standard set out in the case of *Mediahouse Sdn Bhd v Koh Kim Suan* [1998] MLJU 300. The court in this case spelt out the true nature O 22A as follows:

> The court has the jurisdiction to make an order for an interim payment without requiring the plaintiff to satisfy the court either of his need for an interim payment or that he would suffer prejudice if he did not obtain it, since there was no restriction implicit in the rules which would prevent an interim payment being made in the absence of evidence of need or prejudice — In *Schott Kem Ltd v Bentley and Ors* [1990] 3 All ER 850 it was held that:
>
> (1) On their true construction, RSC Ord 29, rr 11 and 12 conferred a discretion on the court whether to order an interim payment at all, but where an interim payment was ordered the amount of the payment should be such amount as the court thought 'just', with the additional limitation in the case of damages that the amount was not to exceed a 'reasonable proportion' of the damages which in the opinion of the court were likely to be recovered by the plaintiff, after taking into account any set off, cross-claim or counterclaim on which the defendant might be entitled to rely. Accordingly, the court had jurisdiction to make an order for an interim payment under rr 11 and 12 without requiring the plaintiff to satisfy the court either of his need for an interim payment or that he would suffer prejudice if he did not obtain it, since there was no restriction implicit in the rules which would prevent an interim payment being made in the absence of evidence of need or prejudice (see p 858 c to e and p 864 d, post); *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181 considered.

[5] Coming back to the case before me, the evidence adduced does not show anywhere that the second defendant had admitted liability for the damages suffered by the plaintiff. Implicitly this was not disputed by the plaintiff. However it was the plaintiff's contention that second defendant's deadly silence and the failure of the second defendant to respond, dispute or deny the contents of the two letters issued by the plaintiff's solicitors dated 5 February 2007 and 28 August 2007, both exhibited in the plaintiff's affidavit in support (Kandungan 21) and marked 'LTS-4' and 'LTS-6' respectively, amounted to an admission of liability by the second defendant for the damages suffered by the plaintiff. Through letter marked LTS-4, the plaintiff demanded that the second defendant immediately ceased all works near the said retaining wall, provide for the plaintiff's approval the second

defendant's design for the shoring works necessary to prevent further movement of the said retaining wall, carry out immediate shoring works for the said retaining wall and make payment for the sum of RM1,000,000 as damages to the plaintiff. The second defendant is to comply with the demand within 14 days from the date of the said letter. Letter marked 'LTS-6' is essentially a reminder of the letter marked 'LTS-4'.

[6] However, in my view the plaintiff's contention could not hold water. the second defendant did not entirely ignore the two said letters of demand. In fact the second defendant responded to the letter 'LTS-4'by issuing a reply on 27 April 2007, also exhibited in the plaintiff's affidavit in support, marked as 'LTS-5' to the effect that '… our insurance adjusters have been visiting your land for purpose of adjusting on the losses suffered by you and which was conveyed to us through your solicitors. Kindly note that the matter is still pending investigation …'. Obviously this letter was in response to the plaintiff's first letter of demand 'LTS-4'. In such event it cannot he said that the defendant entirely ignored the plaintiff's letter of demand. There could be no admission on the part of the second defendant under such circumstances. The plaintiff thus could not rely upon O 22A r 3(1)(a) to pursue his claim. Equally his application would fail under O 22A r 3(1)(b) as the plaintiff has not obtained any judgment against the second defendant.

[7] However, upon perusal of the affidavit evidence I gleaned the following facts and findings:

(a) The plaintiff's property is adjacent to the first defendant's property and this fact was never disputed by the second defendant.

(b) The second defendant had commenced construction works on the first defendant's land, including excavation works close to the retaining wall and this fact was not disputed by the second defendant.

(c) In consequence of the second defendant's excavation works, earth and gravel were removed near the base and under the retaining wall. This is also not denied by the second defendant.

(d) In consequence of the second defendant's actions, the said retaining wall and the internal wall sufferred damages as per the plaintiff's consultant report exhibited as 'LTS-3' in the plaintiff's affidavit in support. The consultant, inter alia, reported that '… the following damage has accured on site:

(i) the existing retaining wall had undergone some settlement and had resulted in cracks.

(ii) the internal road to this retaining wall had also settled and cracks had appeared on the road.

(iii) the water and hydrant pipes along the settled road had broken.

The cause for the above damages, based on our observation at the site was due to excavation works carried out by the owner of the neighbouring lot near the base of and under the land adjoining the existing retaining wall. This deep excavation had resulted in the removal of gravel and earth therefrom and in the absence of any proper shoring had compromised the vertical and lateral support of the said retaining wall. This excavation by the neighbouring lot owner had resulted in the draining of the ground water in the underlying earth, hence affecting the bakau piling and base of the retaining wall, causing this settlement and cracks …'

(e) The second defendant failed to produce any evidence to rebut the plaintiff's evidence as itemised in para (d) above that there were damages as such and that such damages were not caused by their excavation works near the said retaining wall.

(f) The second defendant wrote to the plaintiff vide letter exhibited as 'LTS-5' in the plaintiff's affidavit in support that in their course of investigation their insurance adjusters have informed them that the second defendant's '… rubble retaining wall which is 7-8 feet high may potentially pose a danger to both our respective properties and also human lives …'

(g) The plaintiff has proposed a number of suggestions to rectify the damages through their consultant's report.

(h) The plaintiff through their consultants has procured two quotations in respect of the costing for the rectification works to make good the said damages, one from Chip Lee Earth-Work Construction Sdn Bhd amounting to RM724,320 and the other, from Shiamlite Construction Services, costing RM701,700 as shown cumulatively in 'LTS-3'. Again there were no rebuttal evidence from the second defendant to dispute, rebutt or negate the same.

(i) There were further report by the plaintiff's consultant dated 20 August 2007 (LTS-7 of plaintiff's affidavit in support) to the effect that the damages caused by the ground movement had deteriorated and worsen since their last inspection, caused by seepage of water into the crack areas, causing further settlement. This findings were also not contested by the second defendant.

(j) The facts and evidence shows that the second defendant has not taken any reasonable steps to protect his neighbour's land in carrying out their

A activities in breach of the legal duty of care to their neighbours, ie to ensure that their neighbour's land or properties thereon are not damaged due to the activities on their own land (see *Donoghue v Stevenson* [1932] AC 562).

B (k) The statement of defence advanced by the second defendant amounted to nothing more than a bare denial. All that was averred in their defence were that they have no knowledge of the plaintiff's allegation and put the plaintiff to strict proof thereof. Nevertheless, the authorities suggested that the second defendant must do more to demonstrate that they have a good defence by particularising their defence as against the C plaintiff's claim.

(l) The second defendant failed to produce the investigation report conducted by their own insurance company pertaining to the complaints lodged by the plaintiff through their solicitors as indicated D in their letter dated 5 February 2007 ('LTS-4') in the plaintiff's affidavit in support.

[8] Upon the facts and evidence above I am satisfied that the plaintiff had proven their case on a balance of probabilities. The plaintiff's claim is well E supported by photographs, documentary and affidavit evidence that the second defendant had breached their legal duty of care towards the plaintiff. Being immediate neighbours, the second defendant obviously owed the plaintiff a duty of care to ensure that the plaintiff's land/properties are protected from being damaged resulting from their activities on their own F (second defendant's) land. the second defendant certainly failed to observed this duty of care, resulting in damages occurring on the plaintiff's land/properties occasioned by that failure. The damages on the plaintiff's land is of course something which is very foreseeable. the second defendant failed to see or rather deliberately refused to foresee it for reasons best known G to them. Equally the second defendant did not and had failed to take any reasonable steps to prevent the said damages from occurring. The plaintiff did indeed suffer substantial damages on their land/properties as a result of the second defendant's activities on the land belonging to the first defendant.

H **[9]** In the circumstances, I find that the plaintiff has satisfied the required standard of proof in establishing that it would succeed in its case should it proceed to trial. I therefore allowed the interim payment sought for but only for the sum of RM700,000, being the immediate amount required for urgent works in view of the deteriorating condition of the retaining wall as advocated I by the plaintiff's consultant vide their recommendation as shown in 'LTS-7'. Indeed O 22 r 9 empowers the court to make adjustments with respect to the interim payment as may be just (*Sarlim Timber Processing Factory Sdn Bhd v*

Sasacom Sdn Bhd [2006] MLJU 394). I further ordered that the said sum be paid to the plaintiff through his solicitors within 60 days from the date of the judgment (7 December 2007) and cost of this application to the plaintiff.

Order accordingly.

Reported by Sally Kee